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In The

Supreme Court of the United States

October Term, 1989

THE JIMMY SWAGGART MINISTRIES,

Appellant,

v.

BOARD OF EQUALIZATION OF CALIFORNIA

On Appeal From The Court Of Appeal, State Of California Fourth Appellate District, Division One

REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Page

I. The Facts 1

II. The Standard of Review 4

III. Use Tax Issues 5

IV. Sales and Use Tax Issues 10

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. *Felton*, 473 U.S. 402 (1985) 4

Barr v. *City of Columbia*, 378 U.S. 146 (1964) 6

Bob Jones University v. *United States*, 461 U.S. 574 (1983) 15

Bose Corp. v. *Consumers Union*, 466 U.S. 485 (1984) 4

Bowen v. *Kendrick*, 108 S. Ct. 2562 (1988) 16

Bowen v. *Roy*, 476 U.S. 693 (1986) 14

Braunfeld v. *Brown*, 366 U.S. 599 (1961) 13, 14

Breard v. *Alexandria*, 341 U.S. 622 (1951) 13

California Public Utilities Comm'n v. *United States*, 355 U.S. 534 (1958) 7

California State Bd. of Equalization v. *Sierra Summit, Inc.*, 109 S. Ct. 2228 (1989) 14

Corporation of Presiding Bishop v. *Amos*, 483 U.S. 327 (1987) 16

Covenant Community Church v. *Lowe*, 475 U.S. 1078 (1986) 14

Follett v. *McCormick*, 321 U.S. 573 (1944) ..... *passim*

Frazee v. *Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989) 11, 18

Hale v. *Morgan*, 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978) 7

Hathorn v. *Lovorn*, 457 U.S. 255 (1982) 6

TABLE OF AUTHORITIES – Continued

Page

Hernandez v. *Commissioner*, 109 S. Ct. 2136 (1989) 14

Hibernia Bank v. *State Bd. of Equalization*, 166 Cal. App. 3d 393, 212 Cal. Rptr. 556 (1985) 5

Hobbie v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) 10, 11

Hunt v. *McNair*, 413 U.S. 734 (1973) 16

Institute in Basic Youth Conflicts, Inc. v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 213 Cal. Rptr. 98 (1985) 5, 14

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 4, 5

Lindeleaf v. *Agricultural Labor Relations Bd.*, 41 Cal. 3d 861, 718 P.2d 106, 226 Cal. Rptr. 119 (1986) 7

Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988) 14

Minneapolis Star & Tribune Co. v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) 13

Murdock v. *Pennsylvania*, 319 U.S. 105 (1943)..... *passim*

NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979) 16

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967) 8, 9

National Geographic Society v. *California Bd. of Equalization*, 430 U.S. 551 (1977) 8

Park 'N Fly of San Franciso, Inc. v. *City of South San Francisco*, 188 Cal. App. 3d 1201, 234 Cal. Rptr. 23 (1987) 8

TABLE OF AUTHORITIES – Continued

Page

Regents of the University of California v. *Public Employment Relations Bd.*, 139 Cal. App. 3d 1037, 189 Cal. Rptr. 298 (1983) (procedural history after remand omitted) 7

Sherbert v. *Verner*, 374 U.S. 398 (1963) 10, 11, 13

State of California v. *Superior Court*, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974) 7

Texas Monthly, Inc. v. *Bullock*, 109 S. Ct. 890 (1989) 12, 18

Thomas v. *Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) 10, 11

Tony & Susan Alamo Foundation v. *Secretary of Labor*, 471 U.S. 290 (1985) 14

United States v. *Lee*, 455 U.S. 252 (1982) 13

Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 5, 10, 17

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 11

CONSTITUTIONS

U.S. Const. amend. I 5, 9, 12

U.S. Const. amend. IX 7

U.S. Const. amend. X 7

California Const., Art. III, § 3.5 7

STATUTE

Cal. Rev. & Tax Code, § 6203 (e), (i), Cal. Stat. 1987, Ch. 1145 (eff. Jan 1, 1988) 8

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Esbeck, *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 352-69 (1984) 16

Howe, M., *The Garden and the Wilderness* (1965)..... 16

Kurland, *The Irrelevance of the Constitution: The Religion Clause of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3 (1978) 16

Kurland, P., *Religion and the Law* (1962)..... 16

McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U.L.Rev. 146 (1986) 15

Opinion of the Attorney General, No. 79-524 (Jan. 31, 1980)..... 5

REPLY BRIEF FOR APPELLANT

This case involves a tax on the exercise of religion. The more appellant spreads the gospel, the higher the tax and the greater the administrative burden. The greater those burdens, the less appellant will be able to spread the gospel. Never has this Court countenanced so palpable an invasion of the religious freedom protected under the First Amendment. Appellee attempts to defend this tax by recasting the facts of the case, by suggesting an erroneous standard of review, and by presenting constitutional arguments at odds with this Court's precedents. Those arguments should be rejected, and the churches of America restored to their former status of independence from government force or favor.

I. The Facts

1. *Religious materials.* In our opening brief, we stated that the "only materials at issue are books, pamphlets, tapes, and records with specific doctrinal or worship-related content." Br. 21; see also Br. 3-4 (describing the materials in detail). Appellee, the Board of Equalization of the State of California, contradicts this statement, pointing out that appellant also sold a variety of non-religious items (T-shirts, pens and pencils, etc.), and claiming that "[l]ittle of the merchandise sold by JSM" is directly related to the tenets of its faith. Bd. Br. 9, 10-11, 35. The Board thus attempts to argue a case different from that presented to this Court.

The record clearly reflects (J.A. 59-60), and the Board acknowledges in a footnote (Bd. Br. 8 n.8), that appellant did not contest, and agreed to pay tax on all items that "do not have specific religious-message content." See Br. 3 & n.2. Throughout this litigation appellant has claimed constitutional immunity *only* for the nonprofit, noncommercial distribution of doctrinal or worship-related materials, and both lower

courts decided the case on that basis. J.S. App. A10-A11; J.A. 213-14.[1] The nonreligious materials treated at such length by the Board (which were in any event exceedingly minor in number and value, see Br. 3 n.2) are not at issue in this proceeding.

2. *Uncontradicted evidence of entanglement.* In our opening brief (Br. 35-45), we demonstrated (based on evidence in the record with specific supporting citations) that administration of the sales and use tax during the period in question (1974-81) was unduly burdensome and entailed extensive and intrusive entanglement between religious and governmental authorities. This evidence was uncontradicted; indeed, it was corroborated by evidence offered by the Board.[2] In its brief, the Board attempts to counter this demonstration with the assertion that "[b]y 1981, JSM was an expertly staffed business-type computerized operation which claimed that it segregated sales from donations for income tax reasons." Bd. Br. 36 & n.24.

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[1] To be sure, appellant's worship-related materials include religious music, both vocal and instrumental, and its religious teaching touches on issues of morality such as alcoholism, homosexuality, personal finances, and marriage, as well as the spiritual experiences of well-known Christians, such as Jerry Lee Lewis. If the Board is taking the position that these are "non-religious" (see Bd. Br. 9-10), that position borders on the frivolous. Moreover, it is irrelevant that appellant's publications contain advertisements for employees and publicize broadcasts (Bd. Br. 10), since those publications are not subject to tax under state law and are therefore not at issue in this proceeding. See Bd. Br. 18 n.15.

[2] The Board's district administrator in charge of this case testified that the recordkeeping and accounting practices required by the statutes and regulations, when not "avoided" by prior agreement between the taxpayer and the Board (in the Board's sole discretion) were "burdensome." J.A. 176-77. This contradicts the Board's assertion in its brief (at 35) that "[t]here was and should be no substantial burden in reporting California sales and use taxes." Moreover, the Board admits that an on-site audit lasting 2-3 weeks (by just one taxing jurisdiction out of 7,000) "is no unusual burden" (*id.* at 41 n.27). Evidently, the Board's notion of burden is different from the taxpayer's.

This submission by the Board is both erroneous and inappropriate. First, the Board's vague references to "[b]y 1981" and "after 1981" indicate that it is referring to developments mostly *after* the tax period at issue, notwithstanding its own motion *in limine*, granted by the trial court, barring evidence subsequent to the tax period. Tr. 12. Second, the Board's supporting citation – to Exhibit 15, a notice in the June 1981 issue of appellant's magazine, *The Evangelist* – was *not* admitted "for the truth of the matters asserted" (again, on the Board's own motion). Tr. 32, 36. The Board cannot flaunt the rules of evidence at its own convenience, while falsely accusing appellant of "regularly go[ing] outside the record to support its position" (Bd. Br. 13).[3] Finally, the exhibit cited actually contradicts the Board's claim.[4] It is a notice to appellant's supporters, dated June 1981, describing appellant's *future* plans for an improved, but still rudimentary, computerized recordkeeping system. By the description, the system could not keep up with the varying requirements of 7,000 sales and use tax jurisdictions. Indeed, evidence in the record demonstrates that would be virtually impossible for a religious ministry. J.A. 207-12.

3. *Fixed price v. donations*. The Board refers (Bd. Br. 8) to certain of appellant's publications, which offer items for

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[3] The only examples the Board supplies to support its accusation are found at Bd. Br. 13 n.13. First is our statement that appellant paid for the cost of municipal services received. This statement was supported in our brief with citations to municipal ordinances, matters of public record (Br. 5-6 n.3). Second is a supposed statement that "California does not tax sales by other religious organizations" (citing Br. 40). What we said on the cited page is that it "is not likely" that "the states" will tax the full variety of sales by religious organizations uniformly. Br. 40. The Board's propensity for accusations of bad faith and threats of criminal prosecution (Exh. 47, J.S. App. E1-E2) help to demonstrate why the entanglement with the state caused by this tax seems so threatening to religious organizations.

[4] For the Court's convenience, we have reproduced the cited page from Exhibit 15 as Appendix A to this reply brief.

sale at a fixed price. The Board then asks this Court to infer that all of appellant's "sales" were for a fixed price – an assertion squarely contradicted by the record. J.A. 166-69; see our opening brief, at 4. Even the same item "may have been offered dozens of different ways." J.A. 169, Tr. 171.

II. The Standard of Review

The Board contends that this Court's review of the lower court's ruling on the Establishment Clause issues must be based on a "substantial evidence" test. "[I]f there is substantial evidence in the record (ignoring all conflicting evidence to the contrary) which supports the California courts' determination that JSM failed to establish any violation of the Establishment Clause in the application of the tax in issue, this ruling should be affirmed." Bd. Br. 4; see also *id.* at 11-12. This completely misconceives the nature of appellate review of a claim of unconstitutional entanglement.

The holding below, that the sales and use tax does not "involve the government with an excessive entanglement with religion so as to violate the Establishment Clause" (J.S. App. A29), is not a finding of primary fact. It is a conclusion of law, and is freely reviewable by an appellate court. This Court has repeatedly held that appellate courts in First Amendment cases must independently review the entire record. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499 (1984) (citing cases). For example, in *Aguilar* v. *Felton*, 473 U.S. 402, 407-08 (1985), the district court rejected claims of entanglement on the basis of its review of the evidentiary record; the court of appeals reversed; and this Court affirmed. In so doing, the court of appeals and this Court relied on the "conflicting evidence" as well as the evidence in support of the judgment below. In *Lemon* v. *Kurtzman*, too, this Court declined "to accept the District Court's express findings" on the entanglement question. 403 U.S. 602, 666 (1971) (White, J., dissenting). The entanglement doctrine is prophylactic in nature; the question is whether a particular government policy

is " '*apt* to entangle' " church and state or poses a "*potential* for excessive entanglement." *Lemon*, 403 U.S. at 615 (emphasis added), quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 695 (1970). This Court is not bound by the trial court's assessment of the potential for entanglement in this case.

III. Use Tax Issues

1. *Commerce and Due Process Clauses: Procedural Argument.* Prior to this case, the State of California took the position that the distribution of religious materials by a religious organization is constitutionally immune from sales or use tax. *Opinion of the Attorney General*, No. 79-524 (Jan. 31, 1980) (sales and use tax); *Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 213 Cal. Rptr. 98 (1985) (sales tax only). The Board now describes this Opinion of the Attorney General as "obsolete" (Bd. Br. 20 n.16), though it was issued in 1980, the penultimate year of the tax period in question, and claims that the *Institute* case was "superseded" by the decision below (Bd. Br. 14), though the two decisions were rendered by coordinate divisions of the appellate court. When this case began at the administrative level, however, appellant did not foresee that the Board would so quickly repudiate the position of the State's chief legal officer. Accordingly, appellant initially relied on this simple, dispositive point of law. After the Board's adoption of a new constitutional standard, it became necessary for appellant to address other defects in the Board's finding of tax liability. See *Hibernia Bank* v. *State Bd. of Equalization*, 166 Cal. App. 3d 393, 212 Cal. Rptr. 556 (1985) (allowing taxpayer to raise new issues because of intervening change in the law even though not contained in the claim for refund). One of those defects is the lack of sufficient nexus for taxation under the Commerce and Due Process Clauses.

Appellant raised the Commerce and Due Process Clause issue at its first opportunity after learning of the Board's final decision to reverse the State's prior position on the First Amendment question, and again at every stage in the

litigation (Br. 17 n.12). The Board has responded on the merits.[5] The California courts have had every opportunity to rule on the issue. Indeed, the Court of Appeal initially decided the nexus question on the merits (J.S. App. A35-A37), later deleting that portion of its opinion (J.S. App. A41).

In its brief, the Board makes a half-hearted claim, without citation or explanation, that "[n]exus is not an issue properly before this court and should not be considered" (Bd. Br. 43). But under this Court's precedents, a party cannot avoid resolution of federal constitutional questions on the basis of state procedural rules "unless the procedural rule is 'strictly or regularly followed.' State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to *all* similar claims." *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982), quoting *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964) (emphasis added). In *Hathorn*, the Court entertained a claim that was raised for the first time in a petition for rehearing before the Mississippi Supreme Court. Here, appellant raised the question at every stage in the litigation.

The requirement of exhaustion of administrative remedies invoked by the court below is frequently waived or disregarded by the California courts. In this very case, the Court of Appeal applied the requirement selectively, ruling on the merits of appellant's Ninth and Tenth Amendment claims, despite the fact that these claims were in a procedural posture

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[5] The suggestion by *amici*, the National Conference of State Legislatures, *et al.* (at 12), that the Board was somehow deprived of the opportunity to ascertain the facts about nexus, must be rejected. The Board's audit staff conducted an investigation of the nexus question, which was reviewed by the Board's lawyers and formed the basis for a formal report. J.A. 20-21. The Decision and Recommendation of the hearing officer expressly addressed the nexus issue, notwithstanding the fact that appellant had not raised the question. J.A. 22. See also J.S. App. F6 (staff analysis of nexus issue). Appellant's challenge is to the sufficiency, as a matter of law, of the contacts *as found by the Board*. Consideration of appellant's legal arguments did not and does not require additional fact-finding.

identical to the Commerce and Due Process claims. *Compare* J.S. App. A37-A39 (ruling on the Ninth And Tenth Amendment claims) *with id.* at A41 (striking sections of the opinion ruling on the Commerce and Due Process Claims). This is not unusual. Under California practice, the courts retain the authority to hear claims "involving important questions of public policy," notwithstanding the parties' failure to raise those claims before an administrative agency. *Lindeleaf* v. *Agricultural Labor Relations Bd.*, 41 Cal. 3d 861, 870-71, 718 P.2d 106, 112 (1986), 226 Cal. Rptr. 114, 124; see *Hale* v. *Morgan*, 22 Cal. 3d 388, 394, 584 P.2d 512, 516 (1978), 149 Cal. Rptr. 375, 379, and cases cited therein.[6]

California courts are particularly willing to entertain *constitutional* challenges not raised before administrative agencies, since those agencies are expressly denied authority under the California Constitution, Art. III, § 3.5, to "declare a statute unenforceable, or to refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional." See *Regents of the University of California* v. *Public Employment Relations Bd.*, 139 Cal. App. 3d 1037, 1041-42, 189 Cal. Rptr. 298 (1983) (procedural history after remand omitted). The purposes of the exhaustion requirement are not served if the administrative body has no authority to rectify its errors. An aggrieved citizen cannot be expected to expend time and resources on a futility. See *State of California* v. *Superior Court*, 12 Cal. 3d 237, 250-51, 524 P.2d 1281, 1289-90, 115 Cal. Rptr. 497, 505-06 (1974) (rejecting claim that constitutional challenge, both facial and as applied, was barred for failure to exhaust administrative remedies); see also *California Public Utilities Comm'n* v. *United States*, 355 U.S. 534,

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[6] The Board's supporting *amici*, six organizations of state and local governments, attest that the nexus issue in this case is of "enormous" importance to state and local governments (Am. Br. 2). By the same token, it is important to nationwide religious ministries and other potential taxpayers, as our supporting *amici* demonstrate. The Board would therefore be hard pressed to deny that this case fits within the "important questions of public policy" exception.

539-40 (1958); *Park 'N Fly of San Francisco, Inc.* v. *City of South San Francisco*, 188 Cal. App. 3d 1201, 1208-09, 234 Cal. Rptr. 23, 28 (1987).

2. *Commerce and Due Process Clauses: Substantive Arguments.* On the merits of the Commerce and Due Process nexus argument, the Board contends that appellant had additional contacts with the State beyond its evangelistic crusades, sufficient to constitute nexus. Most of the additional contacts cited by the Board were incidental to the crusades: the taping of music and preaching at the crusades, the distribution of religious materials at the crusades, the traveling to and from the crusades, the setting up at the crusades, and the contact with local churches to promote the crusades. See F Br. 44-45 n.30. These contacts are no less occasional and episodic than the crusades themselves, and add nothing to the Board's assertion of nexus.

In addition, the Board cites several other contacts not relied upon by the decisions under challenge. The first such contact is appellant's use of broadcasting and cable television for solicitation of "sales" (Bd. Br. 44 n.30). But such contacts did not become a statutory basis for assertion of taxing authority under California law until six years after the tax period. See Cal. Rev. & Tax. Code § 6203 (e), (i), Cal. Stat. 1987, Ch. 1145 (eff. Jan. 1, 1988).[7] The second, and final, such contact is appellant's employment of a minister, who was engaged in wholly non-commercial counselling within the State for four of the years in question. Bd. Br. at 43-44 n.29. To uphold nexus on this basis would be a major stretch beyond *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551 (1977). While unrelated business activity is a basis for imposing use tax collection liability (*id.*), this Court has never held that non-business, non-

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[7] Nor would such contacts be sufficient under the Commerce and Due Process Clauses. *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967) (use of instrumentalities of interstate communication for advertising not sufficient nexus for taxation).

commercial activity has any significance for Commerce Clause or Due Process purposes.[8]

3. *The First Amendment Nexus Argument.* The Board largely disregards appellant's principal argument regarding nexus, which is that it violates the Free Exercise Clause to attach a large financial consequence to the exercise of the right to conduct religious worship services in the State of California. This is an alternative ground for decision, entirely independent of the Commerce and Due Process arguments.[9]

Under the Board's nexus determination, any national ministry that distributes materials through the mails to adherents in California will be inhibited from conducting religious meetings within the State, because such meetings will subject it to use tax liability wholly out of proportion to the extent of its in-state activity. The Board's response to this argument (if it can be called a response) is that "[t]here is no factual or legal relationship between the total use tax assessed on mail order sales and the value of material sold at crusades in California" (Bd. Br. 47). But that is precisely our point. The amount of the use tax liability *has no relation* – factual or legal – to the conduct of the crusades, and the crusades therefore should not be used as nexus. The effect is precisely

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[8] *Amici* the National Conference of State Legislatures, *et al.*, take the opportunity of this case to urge an abandonment of *National Bellas Hess* and replacement with a test based on "purposeful cultivation and exploitation of an in-state market." Am. Br. at 17, 20 n.9. Since this suggestion has not been made by a party to the litigation, we assume that the Court will continue to adhere to its precedents. Moreover, since Congress is actively engaged in consideration of the *National Bellas Hess* issue (H.R. 2230, S. Res. No. 80, 101st Cong., 1st Sess. (1989)), it is appropriate to leave major changes in the framework of the law to that body.

[9] The Board does not argue, nor could it, that the supposed procedural bar to consideration of the Commerce and Due Process Clause argument applies to appellant's First Amendment nexus claim. When appellant's counsel made an offer of proof on the nexus issue in trial court, counsel for the Board stated: "I object to it being used for any other purpose *other than the First Amendment*," and the evidence was admitted. Tr. 14 (emphasis added).

the same as the flat license fee struck down in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944). The use tax liability is unrelated to the income generated by the crusades, just as the flat fee was unrelated to the income generated by sales in *Murdock* and *Follett*. Using evangelistic worship services as nexus will deter itinerant preaching, since the mere act of entering a new state to preach will subject the ministry to a potentially incapacitating burden of tax and tax administration, which – according to the Board's theory – will continue long after the evangelistic mission has ended and the preachers have returned to their own state.

IV. Sales and Use Tax Issues

1. This Nation's commitment to a separation between church and state protects churches from government-imposed burdens on their religious activities even as it excludes them from government subsidies of their religious activities. The Board ignores the unbroken practice of the states and the federal government, dating back at least to the Founding, that religious bodies are immune from taxation on their property used for religious purposes, their income derived from activities related to their religious purposes, and the receipts derived from their provision of religious materials and services. This long-standing practice of the states has a clear constitutional foundation in the requirement of separation between church and state. See *Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970), a precedent the Board conspicuously ignores.

The Board proposes a radical retrenchment of free exercise protections. According to the Board, "free exercise is not offended when a tax burden could affect one's choice of conduct." Only the direct conflict between a "religious tenet" and a "government requirement" falls under free exercise protection. Bd. Br. 39-40. This was the argument made, and rejected, 26 years ago in *Sherbert* v. *Verner*, 374 U.S. 398, 402, 404 (1963). See also *Thomas* v. *Review Board*, 450 U.S. 707, 717-18 (1981); *Hobbie* v. *Unemployment Comm'n*, 480 U.S. 136, 141 (1987).

The Board's argument is based on the premise that a tax on religious activity is permissible so long as it is generally applicable and does not single out religion. Bd. Br. 15, 16-17, 18, 19, 28, 29, 39, 40-41. Presumably, the Board would allow the government to impose the 34% corporate income tax on a church's "income" from the collection plate, or an "entertainment tax" on attendance at mass. Since these taxes are "nondiscriminatory," they would be constitutionally unassailable under the Board's revisionist interpretation of free exercise. By contrast, under this Court's interpretation of the Free Exercise Clause, unanimously reaffirmed last Term in *Frazee* v. *Illinois Dep't of Employment Security*, 109 S. Ct. 1514 (1989), the government may not burden the exercise of religion without compelling justification, even if the burden results from enforcement of facially neutral, generally applicable laws or policies, including taxes. See *Hobbie*, 480 U.S. at 141; *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. at 402 (specifically mentioning the taxing power). The Constitution's protections for free exercise necessarily extend beyond equal treatment of churches and commercial businesses. The powers of the state to regulate and tax commercial businesses are nearly plenary; its powers to regulate and tax religious bodies in ways that inhibit the exercise of religion are limited to the "least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718.

The inconsistency between this Court's decisions and the Board's interpretation of the Free Exercise Clause is most evident in the Board's reliance on dissenting opinions in this Court's leading free exercise cases: *Sherbert* (Bd. Br. 32), *Thomas* (Bd. Br. 32), *Murdock* (Bd. Br. 24), and *Follett* (Bd. Br. 24).

The Board's position is most clearly inconsistent with *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Follett* v. *McCormick*, 321 U.S. 573 (1944). The Board contends that "generally applicable" taxes are constitutional, even when applied to the core religious activities of a church. Bd. Br. 31-35. Yet *Murdock* and *Follett* themselves involved general taxes, applied to commercial and religious vendors alike, without discrimination. See 319 U.S. at 115 ("The fact that

the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted"). The Board repeatedly describes appellant, an evangelistic ministry, as a "business-type" organization (Bd. Br. 36, 41 n.27), and insists that it has as much power to tax a church as it does a business. Yet *Murdock* held that a person or organization engaged in disseminating religious doctrine does not become a commercial venture merely because it accepts money to defray the costs of its evangelical work (319 U.S. at 111-112), and the First Amendment is not satisfied merely because the evangelist is treated no worse than a commercial bookseller (*id.* at 111, 115).

The Board attempts to distinguish *Murdock* and *Follett* on the ground that the license fee charged in those cases was collected in advance and involved larger sums. Bd. Br. 15, 21, 22, 23. We do not believe landmark constitutional decisions can be brushed aside so easily. Surely it would have been no better in *Murdock* and *Follett* had the evangelists been required to obtain their licenses at the end of the day. The imposition was the tax – not its timing. As to the magnitude of the tax, the Court drew no distinction, so long as the tax was more than "nominal" (319 U.S. at 114, 116).

The Board also distinguishes *Murdock* and *Follett* on the ground that they involved flat taxes, while the tax here is based on a percentage of actual receipts. Bd. Br. 24.[10] This is the same distinction that five Justices found unpersuasive in *Texas Monthly, Inc.* v. *Bullock*, 109 S. Ct. 890, 906 (1989) (Blackmun, J., joined by O'Connor, J.); *id.* at 913 (Scalia, J., joined by Rehnquist, C.J. and Kennedy, J.). While in some respects a flat tax is more onerous (on vendors with low volume), in other respects – particularly the administrative burden – the sales and use tax is more so. In any event, *Murdock* and *Follett* did not rest on the details of the tax. They were based on the general principle that the state cannot exact a price if the exercise of religion is to remain "free."

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[10] As noted above (at 9-10), the effect of using evangelistic worship services as a "nexus" for imposing use tax collection liability on an out-of-state ministry is functionally identical to a flat tax.

As if recognizing that its purported distinction of *Murdock* and *Follett* is untenable, the Board also advances the proposition that this Court's subsequent free exercise decisions have supported the dissenting opinions rather the opinions for the Court in those cases. Bd. Br. 24. Analysis of those decisions does not bear this out.[11]

United States v. *Lee*, 455 U.S. 252 (1982), did not, as the Board implies (Bd. Br. 26), hold that "government tax needs" always or necessarily outweigh "even direct interference by a tax with religion." *Lee* involved individual taxpayers whose objection was to the particular *use* by the government of their tax dollars. Acceptance of their claim would have opened the door to "myriad exceptions flowing from a wide variety of religious beliefs" (455 U.S. at 260), and would wreak havoc with administration of the tax system. The constitutional claim in this case has nothing whatever to do with varying religious beliefs; it is based on the structural separation between government and religion. The experience of every state since the inauguration of sales and use taxes (including California, until 1980) demonstrates that appellant's constitutional claim can be accommodated without disruption to the tax system.

Minneapolis Star v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), did not, as the Board claims (Bd. Br. 28), make *Murdock* and *Follett* inapplicable to general, non-discriminatory sales taxes. *Minneapolis Star* held only that *for-profit* newspapers are liable for taxation on equal terms with other businesses. This is evident from the Court's reliance on *Breard* v. *Alexandria*, 341 U.S. 622 (1951), which distinguished between commercial magazine vendors and noncommercial purveyors of religious materials. 460 U.S. at 586-87 n.9.

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[11] *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), cited by the Board at Bd. Br. 25, is irrelevant to this case. To the extent that *Braunfeld* held that "legislation which does not make unlawful the religious practice itself" is largely immune from free exercise attack (*id.*), the decision was overruled by *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

Nor did this Court's summary disposition of *Covenant Community Church* v. *Lowe*, 475 U.S. 1078 (1986), imply that transactions between a religious body and those who wish to receive its religious message are subject to tax. See Bd. Br. 28-29. *Covenant Community Church* involved the rental of hotel space by a for-profit secular entity to a church. Appellant does not deny that the commercial transactions of secular businesses are taxable; indeed, appellant pays taxes on purchases from secular suppliers.

The Board's reliance on *California Equalization Board* v. *Sierra Summit*, 109 S. Ct. 2228 (1989) (Bd. Br. 29-30), is particularly surprising. In *Sierra Summit*, the Court applied to the case of a bankruptcy trustee its current doctrine of intergovernmental immunities, under which states "can never tax the United States directly" but can tax private parties with which the United States does business. *Id.* at 2232 (citation omitted). The analogy to our case is that the government cannot tax a religious body directly (with respect to the religious activities that define the core of its existence), though it can tax outsiders with whom the church has a business relationship. The parallel to *Sierra Summit* would be the tax in *Covenant Church* – a tax on a hotel with which a church does business.

Hernandez v. *Commissioner*, 109 S. Ct. 2136 (1989), on which the Board repeatedly relies (Bd. Br. 33, 37-38, 38 n.25, 41, 42), is easily distinguishable from this case. Aside from the allegations of unequal application of the law, the taxpayer in *Hernandez* did not have even a colorable free exercise claim, for denial of a deduction left him neither better off nor worse off than he would have been if there were no income tax at all. Moreover, the tax in *Hernandez* was on income derived from secular sources. The decision has no bearing on the constitutionality of a tax on the religious activity itself.

Nor are *Bowen* v. *Roy*, 476 U.S. 693 (1986), or *Lyng* v. *Northwest Indian Protective Ass'n*, 108 S. Ct. 1319 (1988), cited at Bd. Br. 33, helpful to the Board. Those cases stand for the proposition that individuals have no free exercise right to control the government's own internal procedures or the use of the government's own land. Their logical corollary is that the Free Exercise Clause *is* implicated when the government seeks to regulate or tax

the internal processes of religious bodies, such as their dissemination of religious materials to adherents.

The Board also relies (Bd. Br. 40) on *Bob Jones University* v. *United States*, 461 U.S. 574 (1983), in which this Court upheld application of a tax to a religious school. But the Board fails to point out that the tax in that case was justified by the compelling governmental purpose of eradicating racial discrimination in education. *Id.* at 604. Here, the state has shown no justification whatsoever, other than its preference for taxing appellant rather than tapping an alternative source of revenue. See *Braunfeld* v. *Brown*, 366 U.S. 599, 607 n.4 (1961) (plurality opinion per Warren, C.J.) (the license fees in *Murdock* and *Follett* were struck down "because the State's interest, the obtaining of revenue, could be easily satisfied by imposing this tax on nonreligious sources"). Even the California courts have held that the need for revenue does not constitute a sufficient justification to override a free exercise claim. *Institute in Basic Youth Conflicts* v. *State Bd. of Equalization*, 166 Cal. App. 3d 1093, 1106 (1985) (not followed by the court below).[12]

Finally, the Board relies (Bd. Br. 40-41) on *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 240 (1985), in which this Court upheld application of wage and hour laws to a religious organization. This Court, however, made clear in *Alamo* that the requirements upheld in that case applied "only to commercial activities undertaken with a 'business purpose' " and that they had "no impact" on the Foundation's "evangelical activities." 471 U.S. at 305.

In short, none of the cases cited by the Board even remotely supports its position. For decades, this Court has

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[12] The Board denies that its interest in this case is "revenue raising," and asserts, instead, an interest in "uniform application" of the tax. Bd. Br. 33. We do not see why "uniform application" is of any importance in the abstract, apart from its impact on revenue, unless the administration of individuated exceptions would entail significant administrative burden or danger of arbitrariness. See McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 155-56 (1986). Recognition of a constitutional immunity in this context would entail no increased administrative burden.

held that governmental burdens on the free exercise of religion – even when they are evenhanded and generally applicable – can be sustained only if they are the least restrictive means of achieving a compelling governmental purpose. The Board wishes to reverse these precedents and return to the days before *Sherbert* and *Murdock*. Under the Board's approach, free exercise cases would be easy: the government would always win.

To adopt the Board's position would twist the Religion Clauses beyond recognition. As an original matter, putting aside the historical justifications for insulating religious bodies from state burdens and interference,[13] it would have been possible to read *both* Religion Clauses as the Board suggests: government actions are permissible so long as the same burdens and benefits are imposed on religious and nonreligious organizations alike.[14] But this Court has rejected this "religion-blind" reading of the First Amendment. Religious organizations must be denied government benefits that would further their "specifically religious" activities, even though the benefits are available on a neutral basis to religious and nonreligious organizations alike. *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); see *Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2580-81 (1988). Similarly, religious organizations are immune from burdensome regulation and taxation, absent a compelling governmental purpose, where it would interfere with their core religious functions. *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979); see *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987); *id.* at 341-42 (Brennan, J., concurring); *Murdock* v. *Pennsylvania*, *supra*; *Follett* v. *McCormick*, *supra*.

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[13] See generally M. Howe, *The Garden and the Wilderness* (1965); Esbeck, *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 352-69 (1984).

[14] This is the position long advocated by Professor Philip Kurland. See P. Kurland, *Religion and the Law* 112 (1962). Kurland himself states that his position "met with almost uniform rejection" and "the Supreme Court refused to have anything to do with it." Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 24 (1978).

The Court's interpretation has preserved the symmetry of the two Religion Clauses. The constitutional test is this: if it would be unconstitutional for the government to *subsidize* the distribution of materials such as these by an organization such as appellant, it is equally unconstitutional for the government to *tax* them. The benefits and the burdens of separation balance out. As this Court noted in *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970), the "hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches." The Board's one-sided espousal of the religion-blind standard (applicable to free exercise but not to establishment) would destroy this symmetry. Religious organizations would enjoy none of the benefits, but bear all of the burdens, of separation between church and state. The net effect would be systematically disadvantageous to religion.

2. The Board also argues that the tax liability here is permissible because the incidence is on the recipients of appellant's materials and not on appellant itself. Bd. Br. 23 n.18. This is largely a matter of semantics. As an evangelistic ministry, appellant has the constitutional right to disseminate religious materials without hindrance from the state, and its adherents have an equally protected right to receive and use them.[15] It does not matter which party to the transaction is inhibited. It is the transaction itself – the *exercise* of religion – that enjoys constitutional protection. Thus, the legal incidence of the tax is irrelevant to the free exercise claim.

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[15] The Board complains of our use of the expression "adherents," since appellant distributes materials to all who wish to receive them. Bd. Br. 9. We do not use the term "adherents" in any technical sense. Just as the "adherents" of a church include those who go to hear the sermon (even though the doors are open to all), the adherents of an evangelistic ministry include those who request and obtain the message (sermon tapes, religious music, Bibles, tracts, and so forth). We use the term "adherents" to distinguish the distribution of religious materials *within* the religious community from transactions with secular outsiders, such as commercial publishers or bookstores, whose relationship to the church is commercial rather than religious. We do not challenge the state's authority to tax transactions with secular outsiders.

Moreover, no matter what the legal incidence of the tax may be, the administrative burden falls on the "seller." Thus, the Board's characterization of the tax has no effect on appellant's claim of unconstitutional entanglement.

3. In addition to its attempt to reverse decades of free exercise precedents, the Board portrays appellant's position as far more sweeping and revolutionary than it is. In fact, appellant's position requires nothing more than reaffirmation of long-standing precedents. Notwithstanding the careful delimitation of our position in our opening brief (at 25-26), the Board claims that our position would lead to constitutional immunity from all taxes bearing on religious organizations, including telephone taxes, airline landing fees, gasoline taxes, transportation taxes, and taxes on the acquisition of raw materials. See Bd. Br. 32 n.21, 34 n.22, 40.[16] But different taxes raise different constitutional issues.

Some taxes bear upon the church's participation in the secular commercial world and are therefore within the state's taxing power. When religious organizations venture beyond their religious core, they become subject to generally applicable laws, both imposing burdens and conveying benefits (see our opening brief at 26-31). Thus, taxes on transactions between churches and secular entities (telephone taxes, airline landing fees, gasoline taxes, taxes on raw materials, transportation taxes, and the like) are not constitutionally

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[16] The Board also claims that immunity would have to be extended to the "speech activities of non-commercial organizations and individuals designed to promote the moral, philosophical, environmental, educational, literary, and scientific well being of the world." Bd. Br. 32. This is simply not the case. The free exercise of *religion* does not extend to non-religious activities. *Frazee* v. *Illinois Dep't of Employment Security*, 109 S. Ct. 1514, 1517 (1989). Our point, which the Board has attempted to distort, is that immunity for speech on *religious* issues must be extended to nontheistic or philosophical as well as theistic speakers. Br. 23 n.18, 47-48. In this, we have adopted the position of Justices Blackmun and O'Connor in *Texas Monthly*, 109 S. Ct. at 906. Whether the Free Speech Clause extends similar protection to noncommercial advocacy speech of a nonreligious nature is beyond the scope of this case.

problematic, even though they increase the cost of religious activity.

Moreover, some taxes are relatively simple and straightforward, and create little danger of intrusive, continuing, or hostile interactions between religious and governmental authorities. Sales and use taxes are not among them. The complications of dealing with the shifting laws of some 7,000 taxing jurisdictions, coupled with the uncertainties of determining "cost" and "price" and distinguishing between "payment" and "donation," render the sales and use tax one of the most complicated and entangling of all taxes. Our opening brief (at 35-45) details the ways in which enforcement of this tax will entail frequent and intrusive monitoring, on-site investigations, audits, and negotiations, touching on matters of religious significance. Dealing with one jurisdiction (California) has proven difficult enough. If the decision below is affirmed and other states and localities impose taxes on the distribution of religious materials by out-of-state evangelistic ministries, the administrative burden and conflict will overwhelm all but the largest such organizations.

CONCLUSION

For these reasons, and those presented in our opening brief, the decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One, should be reversed.

Respectfully submitted,

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APPENDIX A

From *The Evangelist*, June, 1981, p. 23 (Exh. 15)

To Our Many Friends . . .

We apologize if our "growing pains" have inconvenienced you in any way, either in responding to your correspondence or in processing an order. We would never purposely be lax in our conduct.

The cartoon above pretty well describes the situation of Jimmy Swaggart Ministries. However, we certainly do not want to slow down. But yet the growth we are experiencing constitutes growing pains.

Last year the organization grew nearly seventy percent. That type of growth is so huge that anyone, even a major corporation, would have extreme difficulties with it. Here are the problems we are having at present.

We are unable to get the receipts to you for your donation as quickly as we would like. The computer now is so overloaded that it is just not large enough to handle this tremendous growth. I realize sometimes that people erroneously think we are not attending to our business, but that is not the case at all. We are working furiously almost around the clock to rectify these problems. I only ask your understanding.

We have just brought in a team of computer experts that we feel will help us to do the things that we desperately need to do, but it is going to take several months to work it out. If you can envision over one million names on our mailing list, and all the tremendous volume that entails, then you can possibly understand our difficulties. The things I am about to say are a part of the goal we are trying to arrive at. I cannot for lack of space list everything, but by the grace of God we

are getting there. At long last we feel we have the right people for the job. It is a monumental undertaking, but for the sake of souls we have no alternative or choice.

Our goals are:

To get receipts to you for your donations in a matter of days after receiving your gift.

That amount on the receipt be correct, even specifying (If need be) what the donation is for.

To be able to give you a total account of your giving at any time that you would request it.

To give you a year-end receipt for all your giving for the past year for income tax purposes.

To process all items so we know at all times exactly what you have asked for, how it is being processed, and when it is being shipped . . . and to do it immediately.

To be able to clean up our mailing list to the extent that what is requested will be sent and not duplicated.

To be able to respond, above all, to your spiritual needs as quickly as we should, because that is the main purpose of our effort and ministry.

There are many other things that we could name that will be attended to. These are the goals we are striving toward. It is a big job. The tremendous growth has caused problems, but these are problems we are glad to have. Until the World Ministry Center is completed (about a year from now), we will have to live with these crowded conditions that cause inconvenience. Please have patience with us. Thank you for your kindness.

Isaiah 54:2 declares: "Enlarge the place of thy tent, and let them stretch forth the curtains of thine habitations: spare

not, lengthen thy cords and strengthen thy stakes." We are attempting to so this, and with your help and understanding we will be victorious and successful.

/s/ Jimmy Swaggart
Jimmy Swaggart